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No. 06-102

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In The

Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD,

Petitioner,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The question presented is:

Whether a district court should establish jurisdiction before dismissing a suit on grounds of *forum non conveniens*?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are Petitioner Sinochem International Co., Ltd. ("Petitioner" or "Sinochem") and Respondent Malaysian International Shipping Corporation ("Respondent" or "MISC").

As to Respondent, its parent corporation is **Malaysia International Shipping Corporation Berhad**; **Petroliam Nasional Berhad** is a publicly held company that holds 10% or more of the party's stock.

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BRIEF FOR RESPONDENT

The complaint in this case, filed by a shipowner whose vessel loaded cargo in the port of Philadelphia, avers negligent misrepresentation against Sinochem International Co. Ltd. ("Sinochem"), a Chinese state-owned steel importer. The misconduct began after a review of documents by Sinochem following an Order from the Eastern District of Pennsylvania permitting subpoenas to issue against Philadelphia companies involved in the loading of the Motor Vessel HANDY ROSELAND.

The Third Circuit joined the Fifth Circuit, although under different bases, in holding that personal jurisdiction should be established before a court rules on a motion to dismiss based on *forum non conveniens*. The bright line test, established by either Circuit, will better serve the administration of justice.

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of the issuance of an ocean bill of lading in the United States following the loading of cargo onto a vessel docked at a port within the United States. Both parties to this action are foreign corporations who were, at least for the transaction involved in this matter, conducting business in the United States with an American corporation. In fact, the connection between the

parties derives solely from their separate dealings with the American corporation.

Respondent Malaysia International Shipping Corporation ("MISC") is the owner of the M/V HANDY ROSELAND. Respondent filed suit against Petitioner Sinochem, the purchaser of the subject cargo, alleging that Sinochem fraudulently misrepresented that MISC antedated a bill of lading while the vessel was docked at a port in Fairless Hills, Pennsylvania, in order to arrest the vessel when it arrived in China. It is claimed that the resultant delay from the arrest caused Respondent significant damages.

On or about February 13, 2003, Sinochem, entered into a contract with Triorient Trading, Inc. ("Triorient"), for the purchase of 20,000 prime hot-rolled steel coils.[1] The coils were to be loaded at a main port in the United States and shipped to a port in Huangpu, China. The contract designated the time of shipment to be "[o]n or before 30 April 2003." Sinochem then caused a letter of credit to be opened by the Bank of Communications in Shanghai to provide security to Triorient for the purchase price of the steel coils and to effect payment. The letter of credit required that certain documents be tendered to the bank to trigger payment. One such document was an ocean bill of lading, which was to be dated on or before April 30, 2003, in order to establish that the steel cargo was loaded onto the nominated vessel no later than that date.

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[1] Sinochem is a Chinese corporation which maintains its principal place of business in Beijing, China. Triorient is located at Two Stamford Avenue, 281 Tresser Boulevard, Stamford, Connecticut.

M/V HANDY ROSELAND is a vessel which sails under the Malaysian flag. At the time in question, the M/V HANDY ROSELAND was being chartered to Progress Bulk Carriers, subchartered to Pan Ocean Shipping Co., Ltd. ("Pan Ocean"), and further subchartered to Triorient. Triorient arranged for the shipment of the steel coils to Sinochem aboard the M/V HANDY ROSELAND. Triorient, through its broker, arranged with Novolog Bucks County, Inc. ("Novolog"), a stevedoring company located in Fairless Hills, Pennsylvania, for the berthing of the M/V HANDY ROSELAND and the subsequent loading of the steel cargo onto the vessel. The estimated date for the vessel's arrival at Fairless Hills was April 24, 2003, with an estimated date of departure from Fairless Hills on April 30, 2003.

The steel coils purchased by Sinochem were stowed in Holds 1 through 5 of the vessel. On April 30, 2003, after Novolog loaded the last steel coil for Triorient onto the M/V HANDY ROSELAND, Bill of Lading No. T01 was issued, which evidenced that the loading of the steel coils was completed "on or before April 30, 2003," in accordance with the contract between Triorient and Sinochem. The bill of lading also noted that the conditions of carriage were "as per charter party." On that same date, Novolog generated a Mate's Receipt indicating that the loading of the subject steel coils had been completed on April 30, 2003. The Mate's Receipt was signed by the Master of the M/V HANDY ROSELAND. Novolog continued loading other cargo onto the M/V HANDY ROSELAND, and the vessel left Fairless Hills en route to China on May 2, 2003. The vessel was scheduled to arrive at the Huangpu Port in China in the beginning of June, 2003.

On May 15, 2003, while the vessel was proceeding to China, Sinochem instituted a miscellaneous action in the

United States District Court for the Eastern District of Pennsylvania against Triorient and Bank of Communications, docketed at 03-MC-87, for the purpose of taking discovery for use in legal proceedings that it was planning to file in China.[2] The discovery was to include subpoenas requesting various documents from Novolog and Barwil (the local husbanding agent for the vessel), all of which were located within the jurisdictional boundaries of the district court, including various communications to/from the vessel related to its arrival, loading, and departure; records of loading; the contract for loading; the charter party; the port statement of facts, and the bill of lading. On May 16, 2003, the district court entered an Order permitting Sinochem to conduct the requested discovery.

On June 8, 2003, Sinochem filed a preservation application in the Guangzhou Admiralty Court in the People's Republic of China alleging that the subject bill of lading was fraudulently dated April 30, 2003, and that the loading of the steel coils allegedly was not completed until May 1, 2004. In filing the application, Sinochem sought an Order authorizing the arrest of the M/V HANDY ROSELAND upon its arrival in China.

The Guangzhou Admiralty Court granted the application on the same date and immediately issued a Vessel Arresting Order, authorizing the arrest of the vessel subject to the posting of security in the amount of $9

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[2] In the Spring of 2003, after Sinochem contracted to purchase the steel coils, the price of hot rolled steel coils fell sharply. http://www.thehindubusinessline.com/2003/04/16/05hdline.htm (follow "Tara Steel dips" hyperlink) (last visited Dec. 6, 2006). Sinochem's actions against Respondent coincide with this change in the market and it was no doubt the precipitating factor.

million U.S. dollars, as well as $15,000 (U.S.) for a fee associated with the enforcement of the Vessel Arresting Order. The Order did not address the substantive nature of Sinochem's claim, but rather, was merely a procedural mechanism to obtain security in the event Sinochem decided to proceed in filing a lawsuit against MISC. In fact, the Order specified that Sinochem had 30 days to file a full complaint with the Chinese Admiralty Court.

The M/V HANDY ROSELAND was arrested at the Huangpu Port in China on or about June 8, 2003. At or about that same time, Sinochem took possession of the subject cargo under Bill of Lading No. T01, without any claim of damage to it during shipment. In order to avoid further delay in the vessel's sailing schedule, MISC posted the requisite bond, and the vessel was released. In response to Sinochem's activities in China, MISC filed this lawsuit on June 23, 2003, alleging that Sinochem negligently misrepresented that the vessel was not loaded as required by contract and as per the bill of lading and, as a result, MISC sustained various damages.

On July 2, 2003 Sinochem filed a complaint against MISC and others in the Guangzhou Admiralty Court, alleging that Bill of Lading No. T01 and the Mate's Receipt were fraudulently antedated. By filing its complaint, Sinochem is attempting to avoid paying for the subject steel. MISC was served with the complaint on July 23, 2003, and subsequently challenged the jurisdiction of the Guangzhou Admiralty Court on the grounds that the bill of lading incorporated the charter party arbitration clause, and that MISC already commenced a lawsuit against Sinochem in the United States. The Guangzhou Admiralty Court initially dismissed MISC's jurisdictional challenges,

but MISC filed an appeal with the Guangdong Provincial High Court.

On March 17, 2004, the Guangdong Provincial High Court of the People's Republic of China issued a civil decision upholding the jurisdiction of the Guangzhou Admiralty Court as to Sinochem's claim. However, the Court also acknowledged that MISC's claim could be brought in the United States, and to do so would neither offend the notion of sovereignty, nor interfere with the jurisdiction of the Chinese Court. The Guangdong Court addressed the issue raised by MISC that there was a proceeding instituted in the United States prior to the commencement of the Chinese action by Sinochem. Of importance, the Court stated that "China and the [US] are two independent sovereignties and countries with different legal systems; whether the appellant [MISC] lodged the lawsuit in the court of the [US] shall not affect the independent jurisdiction over this case as enjoyed by the [Chinese] court." (J.A. 22) (clarification added).

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Court of Appeals for the Third Circuit based on the following:

Determining subject matter and personal jurisdiction at the outset of ruling on a motion to dismiss on *forum non conveniens* is consistent and comports with Supreme Court precedent. The central argument is not whether one addresses a burgeoning federal court docket by allowing more *forum non conveniens* actions regardless of the presence of jurisdiction, but rather, whether it is right to disturb a jurisdictional prerequisite that derives from

Article III of the Constitution and the laws of Congress, simply to achieve judicial economy. Since a *forum non conveniens* analysis necessarily involves two fora which can hear the case, it is axiomatic that the one forum where the court is sitting should first assure itself of jurisdiction. Not every case contains the complexities forecast by Petitioner or Amicus. Nevertheless, personal jurisdiction is a factor in *forum non conveniens*, and whether it be deemed merits based or non-merits based, it is a necessary component from the outset.

Adopting the holding of the Third Circuit comports most closely with current precedent, especially as related to hypothetical jurisdiction and jurisdictional resequencing. It removes ambiguity, yet by the very nature of the personal jurisdiction or *forum non conveniens* analysis still retains for the district judge enormous discretion in reaching a decision.

Balancing the factors involved in reaching a *forum non conveniens* decision inevitably requires the court to consider the substantive issues that will arise at trial. Whether that rises to the level of a merits based decision does not change the fact that a court may not proceed without jurisdiction, for to do so is to act *ultra vires*.

Finally, the limited nature of the doctrine does not result in undue hardship. Initially, a review of cases will suggest that the complicated and multi-faceted phases of a *forum non conveniens* analysis take far more time and are more complicated than ascertaining subject matter and personal jurisdiction. One must concede that there is often an overlap in factual and legal issues addressed in *forum non conveniens*. The ultimate goal, to reduce and uncomplicate the issues in a case before a court, may well be

laudable. Even if that objective is satisfactory, though, one cannot achieve it by any means whatever. The mere fact that the objective, i.e., avoiding delicate or complicated issues, is perfectly laudable does not mean that it can be achieved at the expense of Court precedent and jurisdictional mandates.

ARGUMENT

I. A FEDERAL COURT MUST ASCERTAIN JURISDICTION BEFORE CONSIDERING A MOTION TO DISMISS ON *FORUM NON CONVENIENS*

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. Because the district courts of the United States are created by the Congress and have no ability to act except within the limitations imposed by Congress, they are by design and desire courts of "limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). In order to resolve a case, a federal district court must have both "authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). The language pertaining to jurisdiction is clear and unequivocal. In fact, this Court has historically held that absent a finding of jurisdiction, the federal courts are powerless:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare

> the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Ex parte McCardle, 74 U.S. 506, 514 (1868). This concept was cited with approval by this Court in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

A. The Threshold Matter – Jurisdiction – Is What Gives a Court the Authority to Rule on Merits and Non-Merits Issues.

In establishing district courts, Congress has always premised a court's ability to act on the presence of jurisdiction. *Employers Corp. v. Bryant*, 299 U.S. 374 (1937). As that Court noted:

> By the act of March 3, 1875, c. 137, 18 Stat. 472, dealing with the jurisdiction of the circuit (now district) courts, Congress provided, in § 5, that if a circuit court should be satisfied at any time during the pendency of a suit brought therein, or removed thereto from a state court, that "such suit does not really or substantially involve a dispute or controversy properly within" its "jurisdiction," the court should proceed no further therein, but should "dismiss the suit or remand it to the court from which it was removed, as justice may require."

Id. at 378.

This Court addressed the issue of the application of the doctrine of *forum non conveniens* as it relates to personal jurisdiction in its opinion in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The Court held that "[i]ndeed, the doctrine of *forum non conveniens* can **never**

apply if there is absence of jurisdiction or mistake of venue." *Id.* at 504. (emphasis added).

Neither subject matter jurisdiction nor personal jurisdiction may be lacking prior to a court proceeding to adjudicate a matter. In *Employers Corp. v. Bryant*, the Court held:

> By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam*, . . . is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.

299 U.S. 374, 382 (1937). This principal was affirmed in *Ruhrgas AG v. Marathon Oil Co.*, when the Court held that while the essence of subject matter jurisdiction and personal jurisdiction differ, these two "jurisdictional bedrocks" must be present:

> These distinctions do not mean that subject-matter jurisdiction is ever and always the more 'fundamental.' Personal jurisdiction, too, is 'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583-584 (1999), *quoting Employers Corp. v. Bryant*, 299 U.S. 374, 382 (1937).

In *Ruhrgas*, a controversy over a venture to produce gas in the North Sea, Petitioner removed the cause of action commenced by Marathon citing diversity jurisdiction, federal question jurisdiction (the claims dealt with international relations), and 9 U.S.C. § 205 relating to international arbitration agreements. Ruhrgas moved to

dismiss the complaint for lack of personal jurisdiction. Marathon claimed lack of subject matter jurisdiction, and moved for a remand instead. The district court remanded the case, and on appeal to the Fifth Circuit, that court reversed, holding that an inquiry into subject matter jurisdiction must first be decided before proceeding to personal jurisdiction.

Prior to *Ruhrgas*, the Court decided *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). That case involved a citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986, and at the time of filing, the allegations that defendant failed to file paperwork providing information about hazardous and toxic chemicals had already been corrected by defendant. The issue raised in the suit was whether the statute provided jurisdiction to rule on the purported violations of the Act. *Id.* While the holding specific to the case resulted in a finding that there was jurisdiction, the case is noteworthy in its conclusions about hypothetical jurisdiction. Prior to this period the appellate courts had grown fond of assuming subject matter jurisdiction for the purposes of deciding the merits of a case. This doctrine "[stood] in sharp contrast to these bedrock tenets of federal judicial power." Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts,* 52 Vand. L. Rev. 235 (1999). The Court in *Steel* addressed this issue, and held that hypothetical jurisdiction violated the framers' intent to provide limits on judicial power, and resulted in offending the foundation of the separation of powers. *Steel Co.*, 523 U.S. at 94-95. The Court noted:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental

> principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases.

Id. The Court then referenced the language in *Ex parte McArdle* confining the power of the federal courts.

Just a year later, relying on *Steel*, Justice Ginsburg authored the *Ruhrgas* opinion, reaffirming the concept that "[j]urisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas*, 526 U.S. at 583. While acknowledging that subject matter jurisdiction "customarily" is resolved first, the Court held merely that both aspects of jurisdiction are "fundamental" and "essential", and thus the courts had discretion over which to resolve first in those circumstances where an inquiry into subject matter jurisdiction would be comparatively more complex or entailed. *Id.* The fact is that judicial economy or restraint did not compel the decision; rather the holding represented a position that was not in conflict with the power of the courts to act. Regardless, the effects of *Steel* were interpreted differently by certain courts, culminating in the split between the circuits presented before this Court.

Personal jurisdiction thus can be both a form of jurisdiction and a non-merits issue. The difficulty Petitioner and Amicus have with the decision in this case appears to be the overlapping of personal jurisdiction in the context of jurisdiction (along with subject matter) with non-merits issues (including venue or *forum non conveniens*). They argue that since *Ruhrgas* allo[illegible] personal jurisdiction analysis to trump a subject matt[illegible]urisdiction

inquiry, then the holding in reality speaks to the non-merits aspect of personal jurisdiction. Thus, according to Petitioner, the other non-merits issues, including *forum non conveniens*, are part of the *Ruhrgas* holding.[3] This is not an accurate statement of the Court's holding in *Ruhrgas*.

The scenario exists, as it did in the present case, that a court could be presented with various grounds for dismissal of an action; indeed the record here reflects that Sinochem sought dismissal for lack of subject mater jurisdiction, lack of personal jurisdiction, *forum non conveniens*, and comity. Pursuant to *Ruhrgas,* the district court could have looked at either subject matter jurisdiction or personal jurisdiction first. From the record, we know that Respondent's "allegations with respect to [Petitioner's] enterprises in this country, as well as undisputed facts averred with respect to how the contract was carried out, render [Respondent's] claim far from frivolous." *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 2004 U.S. Dist. LEXIS 4493, *27 (E.D. Pa. Feb. 27, 2004), *rev'd* 436 F.3d 349 (3d Cir. 2006). But the matter was not conclusively resolved. When Petitioner challenged personal jurisdiction, a discrete inquiry would have been necessary to ascertain personal jurisdiction over Sinochem. In this case, then, subject matter jurisdiction was the first issue to be resolved.[4] If, however, the district court

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[3] Petitioner suggests that the Third Circuit decision finds that "federal courts are prohibited from declining [the power to hear a case] in the first instance. . . . " Pet Br. 11. Rather, the view should be that a court must assure itself of the power to hear a dispute, and that requires a finding of both subject matter and personal jurisdiction.

[4] Note, though, in *Ruhrgas* the Court still determined that it was easier, and presumably consistent with Rule 1 calling for the "just,

(Continued on following page)

had chosen to address *forum non conveniens* first, what incentive is there for a court to do anything but grant the motion and dismiss? If a court goes down the long and winding road associated with the *Gulf Oil* and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) factors, *see infra* at I.C., without determining subject matter jurisdiction, and determines it would be improvident to grant the motion to dismiss, but then discovers it has no jurisdiction, there is no judicial economy there. *See, e.g., Intec USA LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006). Permitting a court to dismiss a case before it has even determined whether it can hear the case is simply contrary to the limited basis of jurisdiction federal courts enjoy.

Without a finding of both subject matter jurisdiction and personal jurisdiction, a federal court cannot proceed to adjudicate most other issues – including a determination of *forum non conveniens*:

> The doctrine of *forum non conveniens* does not come into play unless the court in which the action was brought has both subject matter **and personal jurisdiction** and is a proper venue.

(emphasis added). 15 Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 3828 (2d ed. 1986). The concern expressed by Petitioner that abstention, for example, is unaffected by Respondent's position is not relevant. Petitioner is correct that *Steel Co.* does not prohibit

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speedy, and inexpensive determination of every action", Fed. R. Civ. P. 1, to direct the parties to undergo the jurisdictional discovery to ascertain personal jurisdiction. Finding that the defendant's contacts were insufficient to support personal jurisdiction, the district court remanded the action. *Ruhrgas, supra*, at 584.

decisions on "discretionary jurisdictional question[s]". *See Steel Co.*, 523 U.S. at 100 n.3. If the Third Circuit decision stands, as it should, abstention remains unaffected by a finding that personal jurisdiction should be ascertained before ruling on a *forum non conveniens* motion. Venue also remains unaffected if the Court affirms the judgment below, for sound reasons. *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

Consider, for example, a matter filed in state court. If the defendant timely removes the case to federal court, it may do so only in the district court where the state court is located. The facts of the dispute may then reveal, at that early stage, that venue is improper due to various issues, including perhaps a forum selection clause. It is entirely appropriate to rule on the venue matter at that juncture,[5] then allow the next court to deal with the issues of establishing jurisdiction. The other bases raised by Petitioner are similarly explained, and do not interfere with the current issue.

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[5] Left for another day is the fact that a circuit split has arisen on this issue as well. A lack of venue challenge, based upon a forum-selection clause, is sometimes brought as a Rule 12(b)(3) motion to dismiss for improper venue. *See, e.g., Kukje Hwagje Ins. Co. v. M/V HYUNDAI LIBERTY*, 408 F.3d 1250 (9th Cir. 2005); *Continental Ins. Co. v. M/V ORSULA*, 354 F.3d 603 (7th Cir. 2003); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998). Other courts hold that such dismissals are founded on Rule 12(b)(6). *Lambert v. Kysar*, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993). Still other courts looked to Rule 12(b)(1). *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 152 (2d Cir. 1984) (dismissal sought pursuant to 12(b)(1) motion for lack of subject matter jurisdiction).

B. The Third Circuit Decision Is Consistent with this Court's Precedent

Three conflicting approaches presently exist in the circuit courts related to jurisdiction and *forum non conveniens*. Despite *Ruhrgas*, there has been some dispute among the circuits as to whether *forum non conveniens* is a "non-merits" grounds for dismissal, and, therefore, may be adjudicated prior to the establishment of jurisdiction.

1. *Forum non conveniens* is non-merits.

a. The Second and D. C. Circuits limit *Steel* to still permit a hypothetical jurisdictional analysis.

The Second Circuit suggests that so long as there is not a constitutional issue involved, a court is not required to analyze jurisdiction prior to ruling on *forum non conveniens*. *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002).[6] Similarly, in *In re Papandreou*, 139 F.3d

[6] A district court judge in New York recently provided an analysis updating and maintaining the Second Circuit position in light of the circuit split. *Turedi v. Coca Cola Co.*, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006). The opinion gives a thoughtful analysis of whether *Monegasque* should stand in light of the Third Circuit opinion on the issue. The factors of administration of justice and a judge's "inherent power to manage the administration of justice efficiently and fairly, counsels for more rather than less pragmatism and flexibility . . . " *Id.* at *12. Nevertheless, the decision does not address the extensive analysis a *forum non conveniens* analysis entails, nor does it consider the circumstance that the motion to dismiss may be denied, and the court may then be left with no jurisdiction. Compare the decision of that court to review the analysis and comport with existing Second Circuit precedent, with that of *Intec USA LLC. v. Engle*, 467 F.3d 1038 (7th Cir. 2006) (acknowledging split between the circuits, and while disagreeing

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247 (D.C. Cir. 1998), the D.C. Circuit held that *forum non conveniens* is a "non-merits" grounds for dismissal which can be undertaken without first deciding jurisdictional issues. *Papandreou* at 255. (Note: *Papandreou* was decided prior to the Supreme Court's decision in *Ruhrgas*, *supra.*)

b. The Third Circuit finds *forum non conveniens* to be non-merits, and determines courts must first address jurisdictional prerequisites.

Agreeing with the Second and D.C. Circuits, the Third Circuit held that *forum non conveniens* was non-merits based, basing its ruling on the language of personal jurisdiction in *Steel* and *Ruhrgas. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349 (3d Cir. 2006). In these cases, this Court found that personal jurisdiction was a non-merits ground, after reviewing that *forum non conveniens* was not a constitutional Article III jurisdictional issue, after comparing it with other categories. *Id.* at 358-59. The court determined, though, that jurisdiction had to be established because first, *forum non conveniens* "presumes that the court deciding this issue has personal jurisdiction," and second, inferential Court precedent mandates that "*forum non conveniens* dismissals are invalid if the court does not have subject matter jurisdiction." *Id.* at 361-62.

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with the Third Circuit, decides to confirm subject matter jurisdiction before reviewing the district court's dismissal on *forum non conveniens*). In an analysis far shorter than many of the *forum non conveniens* opinions, the Seventh Circuit determined that no jurisdiction existed, and vacated and remanded the case with instructions for the district court to dismiss it for lack of subject matter jurisdiction.

2. The Fifth Circuit finds that *forum non conveniens* is merits-based.

Prior to the Third Circuit decision, the Fifth Circuit had already expressly rejected the holdings of its sister circuits as to *forum non conveniens*. In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005), the court held that *Ruhrgas* cannot be "stretched" to encompass non-merits issues, such as *forum non conveniens*. The case involved an auto accident in Mexico related to alleged defects with the General Motors vehicle, as well as defects to the Cooper Tire & Rubber Company tire. The plaintiffs were Mexican nationals. The Court expressly rejected the plaintiff's argument to follow the other circuits, holding:

> Appellants urge an expansive reading of *Ruhrgas*, arguing that the Supreme Court authorized a court to pretermit a ruling on jurisdiction and decide the case on any "non-merits" issue. They then characterize *forum non convieniens* as a non-merits issue. As stated above, we do not read *Ruhrgas* broadly enough to allow us to pretermit a decision on jurisdiction before deciding some other "non-merits" issue. Even, however, if we could read *Ruhrgas* that broadly, we are satisfied, based on our precedent, that the question of the convenience of the forum is not 'completely separate from the merits of the action.' *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527-28 (1988).

Dominguez-Cota, 396 F.3d at 653. The Fifth Circuit held it could not separate the *forum non conveniens* analysis from the merits because the private factors to be considered under *Gilbert*, for example, required a court to reach the merits. *Id.* at 654. The court relied on *Van Cauwenberghe*

and *Gilbert* to reach its holding that *forum non conveniens* gets entangled in the merits.

Van Cauwenberghe looked at jurisdictional elements in the realm of appealable orders under 28 U.S.C. § 1291. Courts were cautious to maintain the deference due the independence of the district judge, and to prevent piecemeal appeals. Therefore, when the district court denied the motion to dismiss on the ground of *forum non conveniens*, this Court upheld that finding, relying on "the majority of the Courts of Appeals that have considered the issue, that the question of the convenience of the forum is not 'completely separate from the merits of the action' . . . and thus is not immediately appealable as of right." *Van Cauwenberghe*, at 527.

The Fifth Circuit suggests that balancing the factors involved in reaching a *forum non conveniens* decision inevitably requires the court to consider the substantive issues that will arise at trial. Jurisdiction was not part of that analysis; instead, the intermingling of *forum non conveniens* with the merits seemed entirely consistent with appellate rulings at the time, and obviously met with the approval of this Court.[7]

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[7] The Supreme Court cited to *Carlenstolpe v. Merck & Co.*, 819 F.2d 33, 36 (2d Cir. 1987) ("[T]he determining factors in a *forum non conveniens* motion are enmeshed in the underlying cause of action); *Partrederiet Treasure Saga v. Joy Manufacturing Co*, 804 F.2d 308, 310 (5th Cir. 1986) (same); *Rosenstein v. Merrill Dow Pharm. Inc.*, 769 F.2d 352, 354 (6th Cir. 1985) (same); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 195 (3d Cir. 1983). Only one circuit has held that the denial of a motion to dismiss on the grounds of *forum non conveniens* is immediately appealable under 28 U.S.C. § 1291. *See Hodson v. A. H. Robins Co.*, 715 F.2d 142, 145 n.2 (4th Cir. 1983). With the exception of the Fourth Circuit, all of the courts referenced readily

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The Court went on to establish that, inherently, in order to perform the necessary *forum non conveniens* analysis required under *Gulf Oil*, a court must analyze the merits of the case. *Dominguez-Cota*, 396 F.3d at 654. Therefore, the issue for the Fifth Circuit remains merits-based.

This Court has addressed the issue of the application of the doctrine of *forum non conveniens* with regard to personal jurisdiction in its opinion in *Gulf Oil v. Gilbert*. The language pertaining to jurisdiction is clear and unequivocal. This Court held that "[i]ndeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." 330 U.S. at 504. In fact, the holding is premised on prior cases, where historically the Court has held that absence of finding of jurisdiction, the federal courts are powerless:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function reaming to the court is that of announcing the fact and dismissing the cause.

Ex parte McCardle, 74 U.S. 506, 514 (1868).

As the Third Circuit noted in its opinion, the Fifth Circuit expressly rejected the holdings of its sister circuits as to *forum non conveniens*. In *Dominguez-Cota*, the Court held that *Ruhrgas* cannot be "stretched" to encompass non-merits issues, such as *forum non conveniens*. This decision was analyzed in light of other holdings by the Seventh and Ninth Circuits, and distinguished cogently

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acknowledged that the *Gulf Oil* factors in a *forum non conveniens* motion analysis necessarily involved issues related to the merits.

the deficiencies in the Second Circuit Opinion, and the timing of the D.C. Court Opinion in relation to subsequent Supreme Court rulings.

The present dispute confronts an issue that has split the various circuit courts which have considered the issue. The Second Circuit suggests that so long as there is not a constitutional issue involved, a court is not required to analyze jurisdiction prior to ruling on *forum non conveniens*. *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002). Similarly, in *In re Papandreou*, the D.C. Circuit held that the doctrine of *forum non conveniens* is a non-merits ground for dismissal which can be undertaken without first deciding jurisdictional issues. *Papandreou*, at 255 (note: *Papandreou* was decided prior to the Supreme Court's decision in *Ruhrgas*).

C. The Doctrine of *Forum Non Conveniens* Itself Compels a Court to Ascertain Jurisdiction.

Recall the impact of the doctrine of *forum non conveniens*: It gives a court the discretion to decline the exercise of otherwise existing jurisdiction after determining that there is another available forum to hear the case.[8] "We note that *forum non conveniens* is a limited doctrine, typically applying when the alternative forum is in a foreign country or a state court." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice*

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[8] *See, e.g., In re Bridgestone/Firestone, Inc.*, 420 F.3d 702 (7th Cir. 2005) (District court dismissed on *forum non conveniens* grounds when it also held it had no jurisdiction over the case remanded. New information became available while the appeal was pending that the alternative forum was no longer available.).

and Procedure § 3828, at 278-80 (2d ed. 1986). This is because 28 U.S.C. § 1404(a) covers inconvenient forum issues within the federal court system." *Malaysia*, 436 F.3d 349, 358 n.19.

Gulf Oil and *Piper* lay out the procedure for this analysis: The first step is to determine the appropriate forum, noting that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil*, 330 U.S. at 507. Clearly, the forum where the suit is filed must be correct; subject matter and personal jurisdiction help establish that. Next the private interest factors are considered:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id. at 508.

Forum non conveniens is considered when one court having jurisdiction determines that there is another court that is better suited to hear the case. Specifically, "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Gulf Oil*, 330 U.S. at 506-07. The doctrine is completely discretionary. *Forum non conveniens* is similar to personal jurisdiction in

that both are procedural issues, but their distinction is that personal jurisdiction is a question of law while the former is not. Therefore, a court must resolve that threshold issue.

D. The Limited Nature of the Doctrine Does Not Result in Undue Hardship.

The notion of discovery for the purposes of establishing personal jurisdiction is not new to district courts. In *Toys R Us, Inc. v. Step Two, S.A.* 318 F.3d 446, 455-58 (3d Cir. 2003), the Third Circuit held that the district court erred in not allowing jurisdictional discovery. Perhaps it is the suggestion that ascertaining jurisdiction results in judicial inefficiency as compared to ruling on a motion for *forum non conveniens*. In practice, nothing could be further from the truth. Considering the intensive and time consuming analysis that it takes to rule on a motion for *forum non conveniens*, one must concede that personal jurisdiction is much more easily disposed of in the majority of cases than is the dual balancing of factors required under a *forum non conveniens* analysis.

In support of his position that courts may dismiss on *forum non conveniens* grounds before addressing jurisdiction, Amicus argues that to rule otherwise would result in significant judicial resources being devoted to resolve questions over jurisdiction. Elsewhere in its Brief, however, the government recognizes that there is often an overlap in factual and legal issues when addressing the respective issue. It is also conceded that when deciding *forum non conveniens* issues, courts often are required to "at least take a peek at the merits." Nor is there support provided by Amicus for its statement that additional significant judicial resources would need to be devoted

if courts are first required to address the question of jurisdiction. While specific statistics on the number of cases in which *forum non conveniens* is an issue are not readily available, comparing the breakdown of cases filed in the courts overall shows that they represent only a very small fraction of the cases on the federal court dockets. Office of Judges Programs Statistics Division, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics* (Mar. 31, 2006), http://www.uscourts.gov/caseload2006/contents.html. Finally, the notion that another country is expected to determine its jurisdictional status, but a U.S. district court need not bother with the determination prior to a *forum non conveniens* dismissal seem vastly astray from the notion of comity, in that one would expect our own courts to undertake at least the level of work we are asking other courts to perform.

Of course, one cannot fault Petitioner or Amicus for the comments about the supposed waste of resources, given the language in the opinion of the Third Circuit.[9] However, Respondent disagrees with the dictum that the holding results in a waste of judicial resources. As noted, the exercise of evaluating the public and private factors regarding the motion are extensive and time consuming. In maritime cases, for example, the *Lauritzen/Rhoditis* factors are sometimes added to an analysis of similar issues and courts spend pages of a decision determining what status to give a single factor such as the flag of the

[9] We respectfully disagree with Petitioner's spin that the Third Circuit panel was so unhappy with its holding that it immediately sought Supreme Court review to correct it (mindful that *en banc* review of the decision was sought but not granted). Respondent, instead, views the glass as half-full instead of half-empty, and maintains that the review is being sought to bring the other circuits in line with the Third.

vessel. *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Lauritzen v. Larsen,* 345 U.S. 571 (1953). For example, in this case, for the motion Sinochem filed, affidavits from **six different countries** apparently needed to be submitted for Sinochem to make its case. If Fed. R. Civ. P. 1 applies to practitioners as well as the court, *forum non conveniens* is vastly wasteful to the resources of the parties, and not just to a court. On the other hand, a motion to dismiss for lack of personal jurisdiction is direct, and the courts have leeway in deciding such a motion. *Leonard A. Feinberg, Inc. v. Central Asia Capital Corp.*, 936 F. Supp. 250 (E.D. Pa. 1996). ("considerable procedural leeway" exists including consideration of affidavits, or a hearing, or discovery).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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